

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Larry D. Jones, et al.,)	CASE NO. 1: 04 CV 2254
)	
Plaintiffs,)	JUDGE PATRICIA A. GAUGHAN
)	
vs.)	
)	
Arthur B. Boyd, Jr., et al.,)	<u>Order of Dismissal</u>
)	
Defendants.)	

This matter is before the Court upon plaintiffs' Motion to Dismiss Complaint Without Prejudice (Doc. 23) and defendants' Motion to Deny Plaintiffs' Motion to Dismiss Complaint Without Prejudice (Doc.25). For the following reasons, plaintiffs' Motion is GRANTED and defendants' Motion is DENIED.

Pursuant to Federal Rule of Civil Procedure 41(a), plaintiffs may seek an order of this Court dismissing this action without prejudice. For the following reasons, the Court finds the requested relief warranted.

Defendants ask that the Complaint be dismissed with prejudice. However, the Court

would commit an abuse of discretion by doing so. *O'Hara v. Board of Education of Brooklyn City School District*, 72 Fed.Appx. 311, 315 (6th Cir. 2003) (citations omitted). (“By dismissing the claims with prejudice in response to plaintiff’s request for dismissal without prejudice without giving plaintiff notice of its intention to dismiss with prejudice, an opportunity to be heard, and an opportunity to withdraw the request for voluntary dismissal and proceed with the litigation, the court abused its discretion.”)

Defendants also ask that court costs, “legal and consultant” fees and sanctions be awarded. A court may condition a plaintiff’s request for voluntary dismissal on the payment of defendant’s defense costs so as to compensate the defendant for expenses in preparing for trial in the light of the fact that a new action may be brought. *Massey v. City of Ferndale*, 1997 WL 330652 (6th Cir. June 16, 1997). However, defendants have proceeded *pro se* in this action and have appeared to have expended minimal time and resources. Defendants filed a three-page pleading entitled Response to Complaint and Motion to Dismiss Complaint. While the pleading merely requested dismissal, unsupported by discussion, it was subsequently converted to a motion for summary judgment because numerous exhibits were attached. Defendants also thereafter filed a two-page Answer. Discovery has not been completed. In fact, defendants’ expert report was not to be provided until June 14, 2005 and the expert discovery deadline was set for July 14, 2005. Obviously, there has been no trial preparation.

Finally, defendants make a vague reference to a counterclaim filed by plaintiffs herein in a state court action instituted by defendants herein and invoke Federal Rule of Civil Procedure 41(d) (Costs of Previously-Dismissed Action). While defendants assert that the

counterclaim is “based upon or including the same claim against the same defendant,”
defendants fail to demonstrate that Rule 41(d) is applicable.

For the foregoing reasons, plaintiffs’ Motion to Dismiss Complaint Without Prejudice
is granted and defendants’ Motion to Deny Plaintiffs’ Motion to Dismiss Complaint Without
Prejudice is denied.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

Dated: 5/4/05